

Nos. 85-621 and 85-642

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION,
Petitioner,

v.

WILLIAM T. SCHOR, et al.,
Respondents.

CONTICOMMODITY SERVICES, INC.,
Petitioner,

v.

WILLIAM T. SCHOR, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR CONTICOMMODITY SERVICES, INC.

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April 22, 1986

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REPLY BRIEF FOR CONTICOMMODITY SERVICES, INC.

Respondents repeatedly argue that the jurisdiction of the Commission over state law claims is highly unusual, if not unique (see, e.g., Respondents' Br. pp. 7, 13, 16). Of course, that a legislative process may be unique does not make that process inherently suspect, any more than that a process is pervasive renders it immune from constitutional inquiry. Respondents nevertheless suggest that the absence of citation to a similar statutory scheme requires a higher degree of analysis of Congressional intent than might otherwise be necessary to conclude that Congress meant what it said when it observed that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including

counterclaims arising out of the same set of facts. . . ." H.R. Rep. No. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904.

Respondents, however, are mistaken. The Commission's reparations jurisdiction is not unique.

A. The Contract Disputes Act of 1978 Creates A Non-Article III Tribunal Similar to Commission Reparations With Jurisdiction Over State Law Claims.

In 1978, Congress passed Public Law 95-563, the Contract Disputes Act of 1978, 41 U.S.C. § 601, *et seq.*, (the "Contract Disputes Act"). The Contract Disputes Act empowers federal agencies to create boards of contract appeals with "jurisdiction over all disputes arising in connection with an executed contract, including breach of contract claims." S. Rep. No. 95-1118, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5236. Pursuant to this congressional grant of authority, numerous boards have been created to hear and decide contract and breach of contract claims, all of which are traditional state law actions. See, e.g., *Guy Roberts Lumber Co. v. U.S.*, 5 Cl. Ct. 42 (1984) (Department of Agriculture); *William F. Klingensmith, Inc. v. U.S.*, 731 F.2d 305 (Fed. Cir. 1984) (General Services Administration); *U.S. v. W.H. Moseley Co.*, 730 F.2d 1472 (Fed. Cir. 1984) (Armed Services Board of Contract Appeals); *Nab-Lord Assoc. v. U.S.*, 682 F.2d 940 (Ct. Cl. 1982) (Postal Service); *Coastal Corp. v. U.S.*, 713 F.2d 728 (Fed. Cir. 1983) (Department of Energy); *Opalack v. U.S.*, 5 Cl. Ct. 349 (1984) (Department of Labor); 41 U.S.C. § 602(b) (Tennessee Valley Authority).

The various boards of contract appeals are clearly not Article III tribunals, and just as clearly determine state law, contract issues as their day-to-day routines. The Contract Disputes Act passes Constitutional muster in exactly the same way as does the Commodity Exchange Act (the "Act") by virtue of the implied consent of litigants who invoke the jurisdiction of these non-Article III bodies.

B. The Contract Disputes Act, Like The Act Here, Operates With Litigant Consent.

The validity of the boards of contract appeals cannot be sustained by the fact that the government is invariably a party to litigation before the boards. In these proceedings the government is present in its proprietary, not sovereign, capacity, and has no greater rights than a private litigant:

[T]he Government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party.

S. Rep. No. 95-1118, 95th Cong., 2d Sess. 12 (1978), *reprinted in* U.S. Code Cong. & Ad. News 5235, 5246.

The Congressional grant of authority in the Contract Disputes Act is justified for exactly the same reason as under the Act, by the operation of consent. Under the Act, a commodities litigant consents to the assertion of contract counterclaims by electing to pursue a remedy in reparations.¹ Under the Contract Disputes Act, a contract litigant brings his own contract claims and consents to the assertion of contract counterclaims by electing to pursue a remedy before a board of contract appeals.² In each case, consent to jurisdiction is implied by the voluntary election of a forum not vested with Article III attributes.

¹In this case, Schor did more than impliedly consent by electing to proceed in reparations. Schor affirmatively demanded that Conti dismiss its court action and assert its claims in reparations.

²Originally, the Contract Disputes Act was similar to the Act in that it provided a litigant with a choice between proceeding in a non-Article III forum, the board, or in an Article III court, the Court of Claims. In 1982, the Contract Disputes Act was one of numerous statutes amended by the sweep of the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25 (1982). Under the amendment, a litigant has an election of remedies between two non-Article III bodies, a board or the newly created

(footnote continued on next page)

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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(footnote continued from preceding page)

Claims Court. The legislative history does not address the impact of this amendment under an Article III analysis. There remains, of course, implied consent to non-Article III resolution of contract claim by and against the government in that a party need not contract with the government in the first place. In any event, the validity of the Contract Disputes Act as amended by the Courts Improvement Act is not in issue here.